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FILED

SEP 15 2003

RANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PACIFIC COAST FEDERATION OF)
FISHERMEN'S ASSOCIATIONS, INSTITUTE)
FOR FISHERIES RESOURCES, CENTER FOR)
BIOLOGICAL DIVERSITY, OREGON)
NATURAL RESOURCES COUNCIL, PACIFIC)
RIVERS COUNCIL, and ENVIRONMENTAL)
PROTECTION INFORMATION CENTER,)

Plaintiffs,)

v.)

NATIONAL MARINE FISHERIES SERVICE,)

Defendant.)

Civ. No.

03 1833

**CONSENT DECREE
AND STIPULATED ORDER OF DISMISSAL**

This Consent Decree and Stipulated Order of Dismissal ("Consent Decree" or
"Agreement") is made by and between the Plaintiffs Pacific Coast Federation of Fishermen's
Associations, Institute for Fisheries Resources, Center for Biological Diversity, Oregon Natural

CONSENT DECREE AND STIPULATED
ORDER OF DISMISSAL - 1 -

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3

Resources Council, Pacific Rivers Council, the Environmental Protection Information Center ("Plaintiffs") and Federal Defendant National Marine Fisheries Service ("NMFS") (collectively "the Parties").

WHEREAS, on February 16, 2000, NMFS published a final rule designating critical habitat for 19 Evolutionarily Significant Units ("ESUs") of west coast salmon and steelhead (65 Fed. Reg. 7764 February 16, 2000);

WHEREAS, the National Association of Home Builders ("NAHB") challenged the February 16, 2000, critical habitat designations in National Association of Home Builders v. Evans, 2002 WL 1205743 (D.D.C. 2002) as having inadequately considered the economic impacts of the designations. NAHB also challenged NMFS' designation of Essential Fish Habitat ("EFH") (Pacific Coast Salmon Fishery Management Plan, 2000);

WHEREAS, while the NAHB litigation was pending, the 10th Circuit Court of Appeals issued its decision in New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Service ("NMCGA"), 248 F.3d 1277 (10th Circuit 2001). In that case the Court rejected the Fish and Wildlife Service's approach to economic analysis, which was similar to the approach taken by NMFS in the February 16, 2000, critical habitat designations for the 19 ESUs of west coast salmon and steelhead. Subsequent to the Court's decision in NMCGA, NMFS entered into and sought judicial approval of a consent decree resolving the NAHB litigation. That decree provided for the withdrawal of critical habitat designations for the 19 salmon and steelhead ESUs and dismissed NAHB's challenge to the EFH designations. The District Court approved the consent decree and vacated the critical habitat designations by Court Order on April 30, 2002;

WHEREAS, on July 31, 2002, Plaintiffs sent to D. Robert Lohn, Northwest Regional Administrator for NMFS a "Sixty Day Notice of Intent to Sue Over Failure to Designate Critical

Habitat for 20 Evolutionarily Significant Units of Chinook, Chum, Coho, and Sockeye Salmon and Steelhead Trout" pursuant to §§ 4 and 11 of the Endangered Species Act ("ESA") 16 U.S.C. §§ 1533 (a) (3) and 1540 (g). A second "Sixty-Day Notice of Intent to Sue" was sent August 7, 2002;

WHEREAS, on or about September 3, 2003, Plaintiffs filed a Complaint for declaratory and injunctive relief against Defendant NMFS;

WHEREAS, Plaintiffs allege that NMFS has failed to designate critical habitat for 20 ESUs of salmon and steelhead listed as threatened or endangered pursuant to the ESA between 1997 and 2000 in violation of the ESA, 16 U.S.C. § 1533 (b)(6)(C), and its implementing regulations, 50 C.F.R. § 424.17(b), and constitutes arbitrary and capricious agency action in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706;

WHEREAS, NMFS denies Plaintiffs' claims;

WHEREAS, Plaintiffs and NMFS through their authorized representatives have agreed to a settlement of this action, without any admission of fact or law, which they consider to be a just, fair, adequate, and equitable resolution of the claims raised in this action;

WHEREAS, by entering into this Consent Decree, Plaintiffs and NMFS do not waive or limit any claim or defense, on any grounds, related to any final agency action taken in the future or arising out of NMFS' compliance with the procedural steps outlined herein;

WHEREAS, it is in the interest of the public, the Parties, and judicial economy to resolve the issues in this action without protracted litigation;

WHEREAS, the Court finds and determines that this Consent Decree represents a just, fair, adequate, and equitable resolution of the claims raised in this action; and

WHEREAS, the Parties agree that the Court has jurisdiction over this action.

NOW, THEREFORE, it is AGREED between the Parties and ORDERED as follows:

I. DEFINITIONS

1. Unless otherwise expressly provided, terms used in the Consent Decree that are defined in the ESA or in implementing regulations shall have the meaning assigned to them therein as of the date that this Consent Decree is entered by the Court.

II. TERMS OF THE AGREEMENT

2. On or before March 1, 2004, NMFS will provide Plaintiffs with a status report on the progress NMFS is making in developing the proposed rule(s) to designate critical habitat for those of the 20 ESUs^{1/} of salmon and steelhead that are included on the lists of threatened and endangered species as of March 1, 2004. A status report will not be required for any ESU for which a proposed rule has already been issued. The contents of the Status Report will be determined by NMFS in its sole discretion.

3. On or before June 30, 2004, NMFS will submit to the Federal Register for publication the proposed rule(s) designating critical habitat for those of the 20 ESUs that are included on the lists of threatened and endangered species as of June 30, 2004.

^{1/} The term 20 "ESUs" as used in this Consent Decree means Puget Sound, Upper Columbia River spring-run, Lower Columbia River, and Upper Willamette River chinook as listed under the Endangered Species Act ("ESA"), 16 U.S.C. Section 1533, at 64 FR 14308 (March 24, 1999); California Central Valley spring-run chinook and California Coastal chinook as listed under the ESA at 64 FR 50394 (September 16, 1999); Hood Canal summer-run chum and Columbia River chum as listed under the ESA at 64 FR 14508 (March 25, 1999); Ozette Lake sockeye as listed under the ESA at 64 FR 14528 (March 25, 1999); Oregon Coast Coho as listed under the ESA at 63 FR 42587 (August 10, 1998); Upper Columbia River, Snake River Basin, Southern California, South Central California Coast and Central California Coast steelhead as listed under the ESA at 62 FR 43937 (August 18, 1997); Lower Columbia River and California Central Valley Steelhead as listed under the ESA at 63 FR 13347 (March 19, 1998); Upper Willamette and Middle Columbia River steelhead as listed under the ESA at 64 FR 14517 (March 25, 1999) and Northern California steelhead as listed under the ESA at 65 FR 36074 (June 7, 2000).

4. On or before January 18, 2005, NMFS will submit to the Federal Register for publication the final rule(s) designating critical habitat for those of the 20 ESUs that are included on the lists of threatened and endangered species as of January 18, 2005.

5. This Consent Decree does not create any obligations or impose any restrictions upon NMFS, other than creating these deadlines for NMFS to take the actions specified.

III. JURISDICTION AND SCOPE OF JUDICIAL REVIEW

6. Notwithstanding the dismissal of Plaintiffs' Complaint, the Court retains continuing jurisdiction to enforce the terms of this Consent Decree, as limited by Section VII of this Consent Decree entitled "Remedies for Violations of this Consent Decree."

7. This Consent Decree does not confer jurisdiction upon the Court to review any future final rules related to the 20 ESUs and does not alter or affect in any way the standards for judicial review of final agency action. Any challenge to the rulemaking referenced in this Consent Decree must be brought by Plaintiffs in a separate proceeding.

IV. MODIFICATIONS

8. NMFS may seek to extend the dates agreed upon in this Decree. NMFS must notify Plaintiffs of its intent to seek an extension no later than 30 calendar days prior to the date agreed upon in the decree. Upon receipt of notice by the Plaintiffs, the Parties shall engage in a period of negotiations and will attempt to negotiate an extension in good faith. NMFS' notification that NMFS intends to seek to extend the dates agreed upon in this Consent Decree does not preclude plaintiffs from exercising their remedies as set forth in Section VII of the Decree.

V. EFFECTIVE DATE

9. This Consent Decree will become effective upon entry by the Court and the resulting dismissal of this case with prejudice pursuant to Paragraph 10.

VI. DISMISSAL OF CLAIMS

10. All claims advanced by Plaintiffs in the Complaint are hereby DISMISSED with prejudice.

VII. REMEDIES FOR VIOLATIONS OF THIS CONSENT DECREE

11. For any alleged violation by NMFS of the terms of this Consent Decree, Plaintiffs' sole remedy is a motion to enforce the terms of the Consent Decree. Plaintiffs will provide NMFS with 30-calendar days notice before filing a motion to enforce the terms of the Consent Decree. This Consent Decree shall not be enforceable through a proceeding for contempt of court, and Plaintiffs hereby waive any ability they may have to seek contempt of court as a sanction or remedy for Federal Defendant's failure to abide by any terms of this Consent Decree. This decree is not intended to affect the availability of remedies for the failure to comply with orders subsequently issued by the Court.

VIII. NOTICE

12. Any notice to the Parties required by or made with respect to this Consent Decree shall be in writing and shall be effective upon receipt. For any matter related to this Consent Decree the contact persons are as follows:

a. For NMFS:

Kirsten Erickson
Office of NOAA General Counsel, N.W.
7600 Sand Point Way N.E.
Seattle, WA 98155

b. For Plaintiffs:

Patti Goldman
Earthjustice
705 Second Avenue, Suite 203
Seattle, Washington 98104

Upon written notice to the other parties, any party may designate a successor contact person for any matter relating to this Consent Decree.

IX. AGENCY DISCRETION

13. Except as expressly provided herein, nothing in this Consent Decree shall be construed to limit or modify the discretion accorded NMFS under the ESA, the APA (5 U.S.C. § 701 *et seq.*) or by general principles of administrative law.

X. REPRESENTATIVE AUTHORITY

14. Each of the undersigned representatives of the Parties to this Consent Decree certifies that he or she is fully authorized to enter into and execute the terms and conditions of this Consent Decree and to bind legally such Parties to this Consent Decree. By signature below, all of the Parties consent to the entry of this Consent Decree.

XI. INTEGRATION CLAUSE

15. This Consent Decree and Stipulated Order of Dismissal constitutes the final, complete, and exclusive Agreement between the Plaintiffs and NMFS with respect to the matters addressed in this Consent Decree. There are no representations, agreements, or understandings relating to this Consent Decree other than those expressly contained herein.

XII. MUTUAL DRAFTING

16. It is hereby expressly understood and agreed that this Consent Decree was jointly drafted by Plaintiffs and NMFS. Accordingly, the Parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be

inapplicable in any dispute concerning the terms, meaning or interpretation of this Consent Decree.

XIII. COUNTERPARTS

17. This Consent Decree may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original Agreement, and all of which shall constitute one Agreement. The execution of one counterpart by one party shall have the same force and effect as if that party had signed all the counterparts.

XIV. RELEASE BY PLAINTIFFS

18. Upon Court entry of this Consent Decree/Stipulated Order of Dismissal, this Agreement shall constitute a complete and final settlement of all claims that were asserted, or could have been asserted, by Plaintiffs against NMFS in the Complaint filed in this litigation. Plaintiffs hereby release, discharge, and covenant not to assert any and all claims, causes of action, suits or demands of any kind whatsoever in law or equity that it may have had, or may now have, against NMFS based upon matters that were asserted, or could have been asserted, by Plaintiffs in the Complaint filed in this litigation with respect to NMFS' alleged failure to designate critical habitat for the 20 ESUs.

XV. USE OF AGREEMENT

19. This Agreement shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the United States, its officers, or any person affiliated with it, or any interpretation of any applicable provision of law.

XVI. COMPLIANCE WITH OTHER LAWS

20. This Consent Decree shall be governed and construed under the laws of the United States. Nothing in this Agreement shall be interpreted as or constitute a commitment or

requirement that the United States is obligated to pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other provision of law.

XVII. THIRD PARTY BENEFICIARIES


21. Nothing in this Consent Decree shall be construed to make any other person or entity not executing this Consent Decree a third-party beneficiary to this Agreement.

XVIII. ATTORNEYS FEES, EXPENSES AND COSTS

22. The Parties will each bear the costs of their own attorney fees, expenses, and costs and Plaintiffs hereby waive any claims seeking reimbursement for attorney fees, expenses, and costs.

Presented by and Agreed to by:

Dated: September 2, 2003


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Dated: August 29, 2003

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Of Counsel for Federal Defendant

Entered this 12th day of September, 2003.

Thomas Sansonetti
UNITED STATES DISTRICT COURT JUDGE

CONSENT DECREE AND STIPULATED
ORDER OF DISMISSAL - 10 -

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